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No. ——

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1987

EDDIE GERRY STORY, aka
GRADUS E. STORY,

Appellant,

vs.

THE STATE OF CALIFORNIA,

Appellee.

APPEAL FROM A JUDGMENT OF THE CALIFORNIA COURT OF APPEALS, SECOND DISTRICT

JURISDICTIONAL STATEMENT

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QUESTION PRESENTED

1. Does California Penal Code Section 126 violate the Eighth Amendment's proscription against cruel and unusual punishment because it punishes false swearing on a driver's license application as the felony of perjury regardless of the circumstances surrounding the offense and thereby forbids the trial court from reducing such an offense to a misdemeanor?

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APPEAL FROM A JUDGMENT OF THE CALIFORNIA COURT OF APPEALS, SECOND DISTRICT

JURISDICTIONAL STATEMENT

OPINIONS BELOW

On July 2, 1987, the Court of Appeals of the State of California, for the Second Appellate District, Division Four, issued its opinion and affirmed the order of the trial court denying Appellant's motion to declare the offense of perjury to be a misdemeanor. A true and correct copy of the Court of Appeals opinion, in its case number B018776, is printed in Appendix A.

Appellant petitioned the California Supreme Court for review. On September 30, 1987, the California Supreme Court denied the petition. A true and correct copy of the order denying review is printed in Appendix B.

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JURISDICTION

On July 2, 1987, the Court of Appeals of the State of California, for the Second Appellate District, Division Four, issued its opinion and affirmed the order of the trial court denying Appellant's motion to declare the offense of perjury to be a misdemeanor.

The Supreme Court of the State of California entered its order denying review in this matter on September 30, 1987. During the proceedings in the lower courts and again in the California Supreme Court, Appellant had properly drawn in question the validity of a state statute on the ground of its being repugnant to the Eighth Amendment of the Constitution of the United States. However, all courts held in favor of the validity of the state statute. The jurisdiction of this court is invoked under Title 28, United States Code, Section 1257(2). (*Cohen v. California* 403 U.S. 15 1971)).

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CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution, Amendment VIII:

"Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted."

United States Constitution, Amendment XIV, Section 1:

"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction equal protection of the laws."

California Penal Code Sections:

Section 17(b): "When a crime is punishable, in the discretion of the court, by imprisonment in the state prison or by fine or imprisonment in the county jail, it is a misdemeanor for all purposes under the following circumstances:"

"(1) After a judgment imposing a punishment other than imprisonment in the state prison."

"(2) When the court, upon committing the defendant to the Youth Authority, designates the offense to be a misdemeanor."

"(3) When the court grants probation to a defendant without imposition of sentence and at the time of granting probation, or on application of the defendant or probation officer thereafter, the court declares the offense to be a misdemeanor."

"(4) When the prosecuting attorney files in a court having jurisdiction over misdemeanor offenses a complaint specifying that the offense is a misdemeanor, unless the defendant at the time of his arraignment or plea objects to the offense being made a misdemeanor, in which event the complaint shall be amended to charge the felony and the case shall proceed on the felony complaint."

"(5) When, at or before the preliminary examination or prior to filing an order pursuant to Section 872, the magistrate determines that the offense is a misdemeanor, in which event the case shall proceed as if the defendant had been arraigned on a misdemeanor complaint."

Section 118: "Every person, who, having taken an oath that he will testify, declare, depose, or certify truly before any competent tribunal, officer, or person, in any of the cases in which such an oath may by law of the State of California be administered, wilfully and contrary to such oath, states as true any material matter which he knows to be false, and every person who testifies, declares, deposes, or certifies under penalty of perjury in any of the cases in which such testimony, declarations, depositions, or certification is permitted by law of the State of California under penalty of perjury and wilfully states as true any material matter which he knows to be false, is guilty of perjury."

"This section is applicable whether the statement, or the testimony, declaration, deposition, or certification is made or subscribed within or without the State of California."

Section 126: "Perjury is punishable by imprisonment in the state prison for two, three or four years."

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STATEMENT OF THE CASE

Appellant was convicted of perjury in violation of Section 118 of the California Penal Code. The facts for which the conviction arose are as follows: Appellant applied in August 1979 to renew his California driver's license. One of the questions on the application was: "Have you held a driver's license in another state or country in the last three

years?'' Appellant answered ''no'' and signed the form ''under penalty of perjury.'' However, at that time and for approximately the prior seven years, appellant had a driver's license from the state of Nevada.

Appellant was placed on summary probation for two years and fined the sum of $2,000.00. He appealed, and the judgment was affirmed by Division Five of the Second District Court of Appeals on May 29, 1985, in an opinion certified for publication in Case No. 2nd Crim. B003376. The cause is reported at 168 Cal.App.3d 849. A copy of the May 29, 1985 opinion is printed in Appendix C.

Following the going-down of the remittitur, Appellant moved to vacate and set aside the judgment, to enter a plea of not guilty, and to dismiss the action pursuant to Section 1203.4 of the Penal Code.[1] He also moved the court to declare the offense a misdemeanor pursuant to Section 17 of the Penal Code.

On December 16, 1985, the court, in Department South ''J,'' the Honorable Norman W. Gordon, Judge Presiding, granted the motion pursuant to Section 1203.4, Penal Code, set aside the conviction, entered a plea of not guilty and dismissed the action. It was here, in the court of first instance, that the defense argued that other and far more serious crimes could be reduced to a misdemeanor. However, the court denied Appellant's motion to declare the offense a misdemeanor, following the opinion of the Deputy District

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[1] Penal Code Section 1203.4 provides for the setting aside of a guilty verdict and a dismissal of the information against the defendant. Further, with certain exceptions, a defendant who is granted relief pursuant to this section shall thereafter be released from all penalties and disabilities resulting from the offense of which he has been convicted.

Attorney that the offense of perjury was an absolute felony and that it was impossible to declare it a misdemeanor.

A Notice of Appeal from the Order denying the motion to declare the offense a misdemeanor was filed on January 17, 1986, and an appeal followed. In his opening brief on appeal, Appellant once again raised the issue that other far more serious crimes were being punished less severely, and that such action violated the cruel and unusual punishment provision of the Eighth Amendment to the United States Constitution.

On July 2, 1987, the Court of Appeals of the State of California, for the Second Appellate District, Division Four, issued its opinion and affirmed the order of the trial court denying Appellant's motion to declare the offense of perjury to be a misdemeanor. A true and correct copy of the Court of Appeals opinion, in its case number B018776, is printed in Appendix A.

Appellant petitioned the California Supreme Court for review. Again, in his opening brief, Appellant raised the issue that other far more serious crimes were being punished less severely, and that such action violated the cruel and unusual punishment provision of the Eighth Amendment to the United States Constitution. On September 30, 1987, the California Supreme Court denied the petition. A true and correct copy of the order denying review is printed in Appendix B.

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THE QUESTION IS SUBSTANTIAL

I.

CALIFORNIA PENAL CODE SECTION 126 VIOLATES THE EIGHTH AMENDMENT'S PROSCRIPTION AGAINST CRUEL AND UNUSUAL PUNISHMENT BECAUSE IT PUNISHES FALSE SWEARING ON A DRIVER'S LICENSE APPLICATION AS THE FELONY OF PERJURY REGARDLESS OF THE CIRCUMSTANCES SURROUNDING THE OFFENSE AND THEREBY FORBIDS THE TRIAL COURT FROM REDUCING THE OFFENSE TO A MISDEMEANOR.

Appellant has been branded a felon because when filling out his application for a driver's license in the State of California he answered no when asked if he had a driver's license issued in another state or country in the last three years. In fact, at that time and for approximately the prior seven years, Appellant had a driver's license which had been issued by the State of Nevada.

The Eighth Amendment's prohibition against cruel and unusual punishment has been made applicable to the States through the Fourteenth Amendment. *Robinson v. California* 370 U.S. 660 (1962).

Statutes which impose disproportionate punishment have been found to be constitutionally invalid. In *Solem v. Helm* 463 U.S. 277 (1983) this Court recognized that the Eighth Amendment's proscription against cruel and unusual punishment imposes limitations on bails, fines, and other punishments and held that a criminal sentence must be proportionate to the crime for which the defendant has been convicted and that "no penalty is *per se* constitutional." (463 U.S. at 289-290; italics in original.) In look-

ing to see if punishments are cruel and unusual, courts should be guided by objective criteria, including (i) the gravity of the offense and the harshness of the penalty; (ii) the sentences imposed on other criminals in the same jurisdiction; and (iii) the sentences imposed for the commission of the same crime in other jurisdictions. (463 U.S. at 292).

A. The Gravity Of The Offense And The Harshness Of The Penalty.

Appellant had no prior record and was not a hardened criminal or a repeat offender. The trial court obviously did not feel that he required formal probationary supervision since he was placed on summary probation for two years and was required to pay a fine in the sum of $2,000.00. The perjury committed by Appellant did not occur during any judicial or legislative inquiry or proceeding, but occurred on a license application to the Department of Motor Vehicles.

Comparisons of Appellant's offense on a relative scale can be made in light of the harm caused or threatened to the victim or society, and the culpability of the offender. (*Solem*, supra, 463 U.S. at 293.)

Criminal laws make clear that nonviolent crimes are less serious than crimes marked by violence or the threat of violence. (463 U.S. at 293-294) Clearly, Appellant has not committed a crime of violence or threat of violence.

The absolute magnitude of Appellant's crime, as compared with other crimes, is relevant. (463 U.S. at 293.) While Appellant's crime is serious, it is not as serious as if he had committed perjury in a legislative or judicial set-

ting. Although in common parlance, the terms "false swearing" and "perjury" are used interchangeably, in the strict legal sense there is a distinct difference between them. At common law, false swearing is a separate and indictable offense and is distinct from perjury in that the false oath in perjury must be made in a judicial proceeding, whereas in false swearing it need not be made in such a proceeding. (*See: State v. Coleman,* 117 La. 973, 42 So. 471). Petitioner's crime is analogous to "false swearing," rather than common law "perjury."

Moreover, it is clear that the California legislature considered the type of conduct engaged in by Petitioner as less heinous than other forms of perjury since California Vehicle Code Section 20 provides:

> "It is unlawful to use a false or fictitious name or knowingly make any false statement or knowingly conceal any material fact in any document filed with the Department of Motor Vehicles or the Department of the California Highway Patrol."

Petitioner is now a felon, the most serious class of criminal in the State of California.[2] However, a comparison of Petitioner's offense on a relative scale reveals that the harm threatened to society was minimal. In view of the circumstances surrounding this offense, and in view of Petitioner's lack of prior record, the punishment is grossly disproportionate.

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[2] California provides for only three classes of crimes: felonies, misdemeanors and infractions (see Penal Code Section 17.)

B. A Comparison Of The Questioned Punishment With Punishments Imposed Within The Same Jurisdiction For Offenses Which May Be Deemed More Serious.

The legislature of the State of California has provided that certain crimes are either felonies or misdemeanors, granting the trial court the power to declare a so called "wobbler" to be a misdemeanor. Many of these so called "wobblers" include conduct much more serious than the conduct of the Appellant herein.

California Penal Code Section 17 provides, in pertinent part:

> "(A) A felony is a crime which is punishable with death or imprisonment in the state prison. Every other crime or public offense is a misdemeanor, except those offenses that are classified as infractions.
>
> "(b) When a crime is punishable, in the discretion of the court, by imprisonment in the state prison or by fine or imprisonment in the county jail, it is a misdemeanor for all purposes under the following circumstances:
>
> > ". . . (3) When the court grants probation to a defendant without imposition of sentence and at the time of granting probation, or on application of the defendant or probation officer thereafter, the court declares the offense to be a misdemeanor."

In conferring upon the court the power to declare an offense to be a misdemeanor after it had suspended imposition of judgment or sentence, the Legislature evidently intended to enable the court to reward a convicted defendant who demonstrates by his conduct that he is re-

habilitated (*Meyer v. Superior Court* (1966) 247 Cal. App.2d 133).

The following crimes are, by statute, either misdemeanors or felonies, in the discretion of the court:

Cal. Penal Code Section 149—Assault by officer under color of authority;

Cal. Penal Code Section 182—Conspiracy to cheat, defraud, obtain money, etc. by false pretenses; conspiracy;

Cal. Penal Code Section 192(3)(a)—Involuntary manslaughter; driving with gross negligence;

Cal. Penal Code Section 241.1—Simple assault upon a custodial officer;

Cal. Penal Code Section 243—Battery, if injury inflicted or if serious bodily injury;

Cal. Penal Code Section 245(a)—Assault with deadly weapon or force likely to produce great bodily injury;

Cal. Penal Code Section 246—Shooting at inhabited dwelling, building;

Cal. Penal Code Section 261.5—Unlawful sexual intercourse;

Cal. Penal Code Section 262—Rape of spouse;

Cal. Penal Code Section 273.5—Injury to spouse;

Cal. Penal Code Section 273a(1)—Child mistreating likely to produce great bodily injury or death;

Cal. Penal Code Section 273d—Injury to child;

Cal. Penal Code Section 276—Abortion, soliciting woman to submit;

Cal. Penal Code Section 278—Child-stealing;

Cal. Penal Code Section 286—Incest if victim is under 18 years of age, if committed in state prison or county jail, if victim unconscious of nature of act or incapable of giving legal consent;

Cal. Penal Code Section 288a—Oral copulation if victim is under 18 years of age, if committed in state prison or county jail, if victim unconscious of nature of act;

Cal. Penal Code Section 289—Rape, foreign object, by force or violence, if victim incapable of giving legal consent;

Cal. Penal Code Section 337a—Bookmaking; bookmaking with one prior conviction for bookmaking; bookmaking with two or more prior convictions for bookmaking;

Cal. Penal Code Section 452(a)—Recklessly causing fire with great bodily injury;

Cal. Penal Code Section 452(b)—Recklessly causing fire, inhabited structure or property;

Cal. Penal Code Section 452(c)—Recklessly causing fire, structure or forest land;

Cal. Penal Code Section 453(a)—Explosives, flammable matter, possession;

Cal. Penal Code Section 460(2)—Burglary, second-degree;

Cal. Penal Code Sections 470, 470a, 470b, 471, 472—Forgery and possession of fake I.D.;

Cal. Penal Code Section 475—Forged bills and notes, possession;

Cal. Penal Code Section 475a—Forged checks and warrants, possession;

Cal. Penal Code Section 476—Fictitious checks;

Cal. Penal Code Section 476a—Checks, insufficient funds;

Cal. Penal Code Section 484b—Theft, diversion of money received for services, labor, material, etc. if amount diverted exceeds $1,000.00;

Cal. Penal Code Section 484e(4)—Credit cards, four or more acquired in violation of Penal Code 484e in 12-month period;

Cal. Penal Code Section 484f(1)—Credit card, make card purporting to be;

Cal. Penal Code Section 484f(2)—Credit card, sign false name;

Cal. Penal Code Section 484g—Credit card obtained in violation of Penal Code 484e or forged card used for obtaining anything of value, if value of goods, etc. received exceeds $200.00 in consecutive six-month period;

Cal. Penal Code Section 484h(a)—Credit card, fraudulent, merchant furnishing goods with knowledge of, if payment exceeds $200.00 in consecutive six-month period;

Cal. Penal Code Section 487—Grand theft;

Cal. Penal Code Section 496—Receiving stolen property;

Cal. Penal Code Section 497—Stolen property, bringing into state;

Cal. Penal Code Section 499b.1—Joy-riding, with one prior conviction of Vehicle Code 10851 or Penal Code 487(3) involving vehicle or vessel and time served for such conviction, with two or more prior convictions of Penal Code 499b involving vehicle or vessel and time served for such convictions;

Cal. Penal Code Section 502—Computer fraud, malicious access, destruction;

Cal. Penal Code Section 524—Extortion, attempt;

Cal. Penal Code Section 532—False pretenses;

Cal. Penal Code Section 653f(a)—Soliciting commission of certain offenses;

Cal. Penal Code Section 666—Prior conviction for petty theft, time served or a condition of probation;

Cal. Penal Code Section 4532(a)—Escape, attempted escape by misdemeanant, inebriate, or person on work furlough from jail, industrial farm, etc. with force or violence, without force or violence;

Cal. Penal Code Section 4532(b)—Escape, attempted escape by felon from jail, industrial farm, etc. without force or violence, with force or violence;

Cal. Penal Code Section 12020—Dangerous weapons, manufacture, sale, possession; carrying explosive or concealed dirk or dagger; explosive bullets;

Cal. Penal Code Section 12021—Concealable firearms, ownership or possession by felon, addict;

Cal. Penal Code Section 12025(b)—Concealed weapon on person with prior conviction of crimes against person, property, or involving drugs;

Cal. Vehicle Code Section 4463—Forgery of ownership certificate, license;

Cal. Vehicle Code Section 10851—Driving car without consent;

Cal. Vehicle Code Section 20001—Hit and run, personal injury;

Cal. Bus. Prof. C. Section 4390—Dangerous drugs, forgery of prescription, possession secured by forged prescription;

Cal. Health and Safety Code Sections 11152, 11153—Controlled substances, writing, dispensing prescription;

Cal. Health and Safety Code Sections 11154, 11155—Controlled substances, prescribing, administering, furnishing;

Cal. Health and Safety Code Section 11156—Controlled substances, prescribing, administering, furnishing to addict;

Cal. Health and Safety Code Section 11355—Sale or furnishing substance falsely represented as controlled substance, 11054(b), (c), (d)(11-12)(17) or 11055(b), (c) or narcotic in Schedules III, IV, V;

Cal. Health and Safety Code Section 11357—Marijuana possession, concentrated cannabis;

Cal. Health and Safety Code Section 11363—Peyote, cultivating, processing;

Cal. Health and Safety Code Section 11366—Maintaining place for selling, giving, using, 11054(b), (c), (d)(10-12)(17), 11055(b), (c) or narcotics in Schedules III, IV, V;

Cal. Health and Safety Code Section 11368—Narcotic drug, forging, altering prescription;

Cal. Health and Safety Code Section 11371—Violates or sells to minor to violate 11152-11156, with respect to 11054(b), (c), (d)(10-12)(17), 11055(b), (c) or narcotics in Schedules III, IV, V;

Cal. Health and Safety Code Section 11377—Possession without prescription, 11054(d) except (10-12)(17), 11055(d) or nonnarcotic in Schedules III, IV, V;

Cal. Health and Safety Code Section 11382—Sale or furnishing substance falsely represented as controlled substance, 11054(d) except (10-12)(17) 11055(d) or nonnarcotic in Schedules III, IV, V.

As can be seen, this list encompasses many common law felonies, including grand theft. Perjury, on the other hand, was a common law misdemeanor. Since more serious crimes are found to be punished less severely, the challenged penalty is suspect.

C. A Comparison Of The Challenged Penalty With Punishments Prescribed In Other Jurisdictions For The Same Offense:

It has been said that perjury is *malum in se*. The fact that perjury which obstructs the administration of justice may be punished as contempt of court does not preclude its punishment also by indictment. While perjury was regarded as a misdemeanor at common law, under some statutes it is now a felony or a high misdemeanor, although under statutes dividing the crime into two degrees, perjury in the first degree is a felony while perjury in the

second degree is a misdemeanor. The offense of false swearing is made a misdemeanor by some statutes.

A comparison of the challenged penalty in the instant matter with punishments for the same offense, false swearing or perjury, in other jurisdictions reveals the following:

In Maine, "false swearing" is a Class D crime, punishable by less than one year of confinement. (*See: Maine Revised Statutes Annotated* 17-A, Section 1252.)

In New Jersey, "false swearing" is a crime of the fourth degree, a "high misdemeanor." (*See: New Jersey Statutes Annotated,* 2C:28-2.)

In Colorado, both "false swearing" is a petty offense and "perjury in the second degree," defined as a materially false statement which one does not believe to be true, under an oath required or authorized by law, and not in an official proceeding, is a misdemeanor. (*See: Colorado Criminal Code* Sections 18-8-503 and 18-8-504.)

In North Dakota, "false statements" are penalized as misdemeanors. (*See: North Dakota Century Code* Section 12.1-11-02.)

In Alabama, "perjury in the second degree" or "perjury in the third degree" are both perjury not in an official proceeding. Both are penalized as misdemeanors. (*See: Alabama Code* Sections 13A-10-102 and 13A-10-103).

In Ohio, "falsification" is analogous to the crime here, and is punished as a "misdemeanor of the first degree." (*See: Ohio Revised Code Annotated,* Section 2921.13.)

In Utah, a "written false statement" is analogous to the crime here, and is punished as a "Class B misdemeanor." (*See: Utah Code Annotated,* Section 76-8-504.)

In Kentucky, the analogous crime of "false swearing" is punishable as a "Class B misdemeanor." (*See: Kentucky Revised Statutes* Section 523.040.)

In West Virginia, the punishment for perjury or false swearing is discretionary, and includes misdemeanor punishment. (*See: West Virginia Code* Section 61-5-3.)

In Oregon, the analogous crime of "false swearing" is punishable as a "Class A misdemeanor." (*See: Oregon Revised Statutes* Section 162.075.)

In Pennsylvania, the analogous crime of "false swearing" is punishable as a "misdemeanor of the second degree." (*See: Pennsylvania Consolidated Statutes* Section 4903.)

In Washington, the analogous crime of "false swearing' is punishable as a "gross misdemeanor." (*See: Revised Code of Washington* Section 9A.72.040.)

In South Carolina, the analogous crime of "perjury" is punishable by imprisonment for six months. (*See: Code of the Laws of South Carolina* Section 16-9-10.)

In Louisiana, the analogous crime of "false swearing" is punishable by imprisonment for not more than one year. (*See: Louisiana Revised Statutes* Section 125).

In Maryland, "perjury" is punishable by imprisonment in either the jail or penitentiary (analogous to a "wobbler" in the State of California). (*See: Annotated Code of Maryland* Article 27, Section 439.)

In Massachusetts, "perjury" is punishable by imprisonment in either jail or state prison. (*See: Annotated Laws of Massachusetts* C. 268, Section 1.)

In New Hampshire, the analogous crime of "false swearing" is punishable as a misdemeanor. (*See: New Hampshire Revised Statutes Annotated* Chapter 641:2.)

In Montana, the analogous crime of "false swearing" is punishable by imprisonment in the county jail for any term not to exceed six months. (*See: Montana Code Annotated* Section 45-7-202.)

In Missouri, the analogous crime of "false affidavit" is punishable as a "Class A Misdemeanor" if done for the purpose of misleading a public servant in the performance of his duty; otherwise, making a false affidavit is a "Class C misdemeanor." (*See: Annotated Missouri Statutes* Section 575.050.)

In New York, the analogous crime of "perjury in the third degree" is a "Class A misdemeanor." (*See: New York Consolidated Laws Service Annotated Statutes* Article 210, Section 210.05.)

In Hawaii, the analogous crime of "false swearing in official matters" is punishable as a misdemeanor. (*See: Hawaii Revised Statutes* Section 710- 1061.)

In Florida, the analogous crime of "perjury when not in an official proceeding" is punishable as a "misdemeanor of the first degree." (*See: Florida Statutes Annotated* Section 837.012.)

In Connecticut, the analogous crime of "false statement" is punishable as a "Class A misdemeanor." (*See: Connecticut Penal Code* Section 53a-157.)

In Delaware, the analogous crime of "perjury in the third degree" is punishable as a "Class A misdemeanor." (*See: 11 Del. Code* Section 1221.)

In Texas, "perjury" is punishable as a "Class A misdemeanor." (*See: Texas Codes Annotated* Title 8, Chapter 37, Section 37.02.)

As can be seen, the vast majority of jurisdictions penalize the type of conduct present here as a misdemeanor. The disparity between the penalty which is challenged here and these other penalties evidences the excessiveness of the challenged penalty.

———o———

CONCLUSION

The imposition upon the Appellant of penalties attendant to conviction of a felony violates all three prongs of the test for cruel and unusual punishment which this Court has propounded. The rationale for the proscription against cruel and unusual punishments was discussed in *Weems v. United States* 217 U.S. 349 (1909), wherein this Court stated:

> "The [founding fathers] were men of action, practical and sagacious, not beset with vain imagining, and it must have come to them that there could be exercises of cruelty by laws other than those which inflicted bodily pain or mutilation. With power in a legislature great, if not unlimited, to give criminal character to the actions of men, with power unlimited to fix terms of imprisonment with what accompaniments they might, what more potent instrument of cruelty could be put into the hands of power? And it was believed that

> power might be tempted to cruelty. This was the motive of the clause, and if we are to attribute an intelligent providence to its advocates we cannot think that it was intended to prohibit only practices like the Stuarts, or to prevent only an exact repetition of history. We cannot think that the possibility of a coercive cruelty being exercised through other forms of punishment was overlooked. We say 'coercive cruelty,' because there was more to be considered than the ordinary criminal laws. Cruelty might become an instrument of tyranny; of zeal for a purpose, either honest or sinister.''

The penalties accompanying Appellant's conviction in this matter are grave and disproportionate to the crime committed. For the foregoing reasons, Appellant prays that this Court reverse the judgment of the Court of Appeals of the State of California.

Respectfully submitted,

Scott Spolin
Theodore A. Cohen
Attorneys for Appellant

APPENDIX "A"

NOT FOR PUBLICATION IN
THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE
STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

THE PEOPLE,	) No. B018776
Plaintiff and Respondent,	) (Super.Ct.No. A025164)
	) (Filed July 2, 1987)
v.	)
EDDIE GERRY STORY,	)
Defendant and Appellant.	)

APPEAL from an order of the Superior Court of Los Angeles County. Norman W. Gordon, Judge. Affirmed.

Theodore A. Cohen, for Defendant and Appellant.

John K. Van de Kamp, Attorney General, Steve White, Chief Assistant Attorney General, Marc E. Turchin, Supervising Deputy Attorney General, and David F. Glassman, Deputy Attorney General, for Plaintiff and Respondent.

Eddie Gerry Story appeals from the order denying his motion to declare the offense of perjury (Pen. Code § 118) a misdemeanor (Pen. Code § 17). He contends: "I. The trial court followed existing case law, which should now be overruled. II. The trial court's denial of defen-

dant's motion to declare the offense of perjury a misdemeanor pursuant to Penal Code section 17 on the grounds that perjury is a 'straight felony' denied defendant equal protection of the laws under the Fourteenth Amendment to the United States Constitution and under provisions of the California Constitution (art. I, sections 11 and 21). III. The legislative determination that perjury shall be punishable as a 'straight felony,' precluding the trial court from declaring the offense to be a misdemeanor, constitutes cruel and unusual punishment in light of other more serious crimes which provide for alterative punishment. IV. The legislative determination that the crime of perjury shall be punishable as a 'straight felony' without giving any discretion to the trial court to declare the offense a misdemeanor when warranted by the circumstances constitutes cruel and unusual punishment."

Appellant, who is in the business of repossessing cars, applied in August 1979 to renew his California driver's license. One of the questions on the application was: "Have you held a driver's license in another state or country in the last three years?" Appellant answered "no" and signed the form "under penalty of perjury." However, at that time and for approximately the prior seven years, appellant had a driver's license from the state of Nevada.

Appellant was tried by jury and found guilty of the felony of perjury. (Pen. Code § 118). On appeal, the judgment was affirmed. (*People v. Story* (1985) 168 Cal. App.3d 849.) Appellant subsequently moved, in the trial court, to vacate the judgment, to enter a plea of not guilty and to dismiss the case pursuant to Penal Code section 1203.4. In addition, appellant moved to have the offense

of perjury declared a misdemeanor. The court declined to declare the perjury offense a misdemeanor, but granted the motion to dismiss pursuant to Penal Code Section 1203.4.[1]

Apart from the fact that appellant could have, but failed to raise his present contentions in his prior appeal (see *People v. Munoz* (1975) 51 Cal.App.3d 559, 563), they are without merit. As appellant concedes, the trial court correctly applied existing law in determining that perjury cannot be rendered a misdemeanor and is an "absolute felony offense." (Cf. *People v. Lopez* (1967) 249 Cal.App. 2d 93, 103.)

Appellant's contention, that the trial court's denial of his motion to declare the offense of perjury a misdemeanor denied him equal protection of the law, is also without merit. Any person convicted of perjury would, as was appellant, be convicted of felony. (See *In re Gary W.* (1971) 5 Cal.3d 296, 303; *People v. Rezler* (1985) 169 Cal. App.3d 1160, 1166-1167.)

Appellant's related contentions, that it is cruel and unusual punishment both for perjury to be punishable only as a felony and for the trial court to have no statutory discretion to render the offense a misdemeanor, are similarly meritless. It is the function of the Legislature to determine the range of criminal penalties (*In re Lynch* (1972)

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1. A dismissal pursuant to Penal Code section 1203.4, subdivision (a), provides, in pertinent part, that the defendant is "released from all penalties and disabilities resulting from the offense of which he or she was convicted, except as provided in Section 13555 of the Vehicle Code [regarding revocation or suspension of the privilege of the person convicted to drive a motor vehicle]." (See also Bus. & Prof. Code, §§ 475, 480, subds. (a)(1), (b), 7510.1, regarding the professional licensing of automobile repossesors.)

8 Cal.3d 410, 423) and the felony punishment for perjury is not so " 'out of all proportion . . . [citations]' " (*id.* at p. 424) as to fail "[t]he sole test . . . [of] whether the punishment 'shocks the conscience and offends fundamental notions of human dignity.' [Citation.]" (*People v. Dillon* (1983) 34 Cal.3d 441, 487, fn. 38.) Particularly in view of the nature of the offense and/or the offender (*In re Lynch, supra,* 8 Cal.3d at pp. 437-438) and "the penological purposes of the prescribed punishment" (*In re Foss* (1974) 10 Cal.3d 910, 919-920), appellant's term of felony probation is neither cruel nor unusual punishment.

The order under review is affirmed.

NOT FOR PUBLICATION IN
THE OFFICIAL REPORTS

McCLOCKY, J.

We concur:

WOODS, P.J.

KINGSLEY, J.

APPENDIX "B"

ORDER DENYING REVIEW

AFTER JUDGMENT BY THE COURT OF APPEAL

2nd District, Division 4, No. B018776
S001958

IN THE SUPREME COURT OF
THE STATE OF CALIFORNIA

IN BANK

PEOPLE

v.

EDDIE GERRY STORY

(Filed September 30, 1987)

Appellant's petition for review DENIED.

LUCAS
Chief Justice

APPENDIX "C"

CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE,	)	
	)	2d Crim. No.
Plaintiff and Respondent,	)	B003376
	)	
v.	)	(Super. Ct. No.
	)	A025164)
EDDIE GERRY STORY,	)	
	)	(Filed May 29,
Defendant and Appellant.	)	1985)
	)	

APPEAL from a judgment of the Superior Court of Los Angeles County. Pat Mullendore, Judge. Affirmed.

Henry Salcido and Edward P. George, Jr., for Defendant and Appellant.

John K. Van de Kamp, Attorney General, and Shunji Asari, Deputy Attorney General, for Plaintiff and Respondent.

Appellant Eddie Gerry Story, aka Gradus E. Story, was tried by jury and found guilty of perjury. (Pen. Code, § 118). He was granted probation for two years on condition that he pay a $2,000 fine and obey all the laws.

Appellant, born in Holland, was originally named Gradus Evaradus Story. After he came to the United States at age four, his parents called him Eddie Story. When appellant became a naturalized citizen in October 1972 he legally changed his name to Eddie Gerry Story.

That same year appellant obtained a Nevada driver's license under the name Eddie Gerry Story. He maintained this license through 1979 and up to the time of trial.

A California driver's license was issued to appellant in 1967 in the name Gradus Evaradus Story. In August 1979 appellant applied to renew his California driver's licnese under the same name: Gradus Evaradus Story. On the application were four questions, one of which was: "Have you held a driver's license in another state or country in the past three years?" Appellant answered "no." He proceeded to sign the application. By signing he certified under penalty of perjury that all of his statements on the application were true.

Since 1970 appellant has been in the business of repossessing cars and heavy equipment for banks, finance companies and credit unions. His business has been incorporated in California since 1978; it is incorporated in no other state.

During April of 1982 appellant received a suspension notice from the California Department of Motor Vehicles (DMV). The notice was sent because appellant was cited for seven moving violations. The notices are sent to repeated violators, even those holding out-of-state licenses. Each time he was stopped for a violation appellant gave the officer his Nevada license rather than his California license. Out-of-state traffic violators are tracked by DMV through the issuance of a fictitious number and the creation of a file related to that number. Eddie Story, holder of a Nevada driver's license, had a DMV file related to his accumulated traffic violations. Because appellant's California license was held under a different name the DMV did not relate the two licenses.

Appellant's explanation: Whenever he was stopped for a traffic violation in California and gave the officer his Nevada license, it was "the only license I had." He elaborated: "It's the only one I had on me. That's it."

In response to the suspension notice, appellant requested a hearing, which was held on May 26, 1982. At the hearing appellant told the DMV referee handling the case that he formerly held a California license under the name of Gradus E. Story, but neglected to mention how recently he had canceled the license—on April 20, 1982, only six days after the mailing of the notice of suspension.

Prior to the suspension notice, during March 1982, appellant was visited at his place of business by a DMV inspector. He showed the inspector his Nevada license and explained that he did not have a California license. Appellant denied being a California resident. The inspector, attempting to verify appellant's residence, checked appellant's business license, which was on file with the City of Long Beach. The business license showed a California address and a California driver's license number. The license number was the one assigned to Gradus E. Story.

Appellant's explanation: He believed that his California license had been destroyed in a fire on March 1, 1980. For this reason he told the DMV inspector in March 1982 that he did not have a California license. He found the license "at some later point in time" in a box of papers that had survived the fire, brought the license to the DMV and canceled it because he was told by his attorney—right after the visit by the DMV inspector in March 1982—that he was "not supposed to have both" California and Nevada licenses.

DISCUSSION

Appellant contends that the evidence at trial was insufficient to support a perjury conviction. He maintains that the People did not carry their burden of proving that he intended to make a false statement on the DMV application under penalty of perjury.

A conviction for perjury requires that the accused have the specific intent to make a false statement under penalty of perjury. (*People v. Viniegra* (1982) 130 Cal. App.3d 577, 586; Pen. Code § 118.) The statement must be known by the accused to be false at the time it was made and must be willfully made. An act is willfully done when done intentionally and without excuse. (*Green v. Stewart* (1930) 106 Cal.App. 518, 528.)

The People met their burden of proving appellant's specific intent. To begin with, appellant is an automobile repossessor with experience in working with the DMV and is familiar with DMV forms. There was evidence that he read the overall application form: He remembered that one of the questions dealt with illness and disability. The certification appeared directly below the questions, and the place for the applicant's signature, where appellant in fact signed, was immediately below the certification. He did not fill out the forms in a rush; he was at the DMV for several hours, waiting for his application to be processed. In addition, the DMV employee who processed appellant's application testified that, while she had no specific recollection of appellant, in 1979 she routinely followed a procedure in which she asked each applicant: "Under penalty of perjury, are all the answers true and

correct?"[1] There was no issue of his ability to comprehend the meaning of certifying under penalty of perjury that all one's responses are true. Appellant testified that he understands what the certification means. He at no time stated at trial that he did not understand that he was signing under penalty of perjury. He first testified that he could not recall reading the certification at the time he signed, but, pressed by defense counsel, he conceded that he "may have" read it. There is no merit to this contention.[2]

Appellant also contends that the trial court erred in failing to instruct the jury *sua sponte* on a lesser included offense, making a false statement to the DMV. (Veh.

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1. Appellant attempts to heighten the import of this DMV procedure to a "two-pronged standard" for certification under penalty of perjury. His argument is that the People failed to meet their burden of proof because after they introduced the testimony regarding the procedure they were unable to prove that he had actually been asked the question by the application processer. But the DMV procedure is nothing more than an internal guideline for its employees. Regardless of which side introduced the evidence it has no impact on the People's burden of proof. The witness' inability to state that she had actually asked appellant if all of his answers were true went only to the weight of her testimony. And, in light of all the evidence, the testimony that she did not recall processing appellant's application was not, as appellant contends, "fatal" to the People's case.

2. Appellant also challenges the trial court's denial of his motion for acquittal. The trial court determined that there was substantial evidence of the existence of each element of perjury. (*People v. Veitch* (1982) 128 Cal.App.3d 460, 466; *People v. Patino* (1979) 95 Cal.App.3d 11, 27.) In light of our rejection of appellant's contention that the evidence did not support conviction, we of course find no merit in this challenge.

Code, § 20.) We do not agree. Under Penal Code section 118 one who certifies under penalty of perjury, where such certification is permitted by law, and wilfully states as true any material matter known to be false is guilty of perjury. Perjury is a felony. (Pen. Code, § 126.) Under Vehicle Code section 20 it is unlawful to knowingly make any false statement or conceal any material fact in any document filed with the DMV. Violation of Vehicle Code section 20 is a misdemeanor. (Veh. Code, § 40000.5.) An uncharged crime is included in a greater charged offense if the language of the accusatory pleading encompasses all the elements of the lesser offense. (*People v. Wolcott* (1983) 34 Cal.3d 92, 98; *People v. Marshall* (1957) 48 Cal. 2d 394.) The information filed in this case advised appellant that he was being accused of perjury for the false statements he made on the DMV application. Under the above stated test for determining lesser included offenses, Vehicle Code section 20 is included in the perjury offense in this case.

However, the court is required to instruct on lesser included offenses only when the evidence raises a question whether all the elements of the charged crime have been proved and would support a reasonable jury determination that the defendant committed the lesser but not the greater crime. (*People v. Sedeno* (1974) 10 Cal.3d 703, 715; *People v. Noah* (1971) 5 Cal.3d 469, 479; *People v. Wickersham* (1982) 32 Cal.3d 307, 325.) Instruction on lesser included offenses is not required when the evidence shows that, if guilty at all, defendant committed the greater crime. (*People v. Noah, supra.*)

Appellant merely denied that he intended to lie.[3] If believed by the jury, he was not guilty of violating either Vehicle Code section 20 or Penal Code section 118. However, if disbelieved by the jury, appellant was guilty of perjury in violation of Penal Code section 118 as charged. To justify a conviction of Vehicle Code section 20, the jury would have to find that appellant intended to lie but did not intend to do so under penalty of perjury. This was not appellant's defense nor does the evidence support this theory.

The judgment is affirmed.

Feinerman, P.J., and Eagleson, J., concurred.

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3. Appellant testified on direct examination as follows:

"Q Was it your intent when you went to DMV to lie or falsify or attempt to conceal anything that was in your past?

"A No.

"Q The two questions [on the application] that you made reference to that you answered 'no,' was it your intent to lie about anything?

"A No, it was not."

APPENDIX "D"

SCOTT SPOLIN
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IN THE COURT OF APPEALS
OF THE
STATE OF CALIFORNIA,
SECOND APPELLATE DISTRICT

EDDIE GERRY STORY, aka GRADUS E. STORY Appellant, vs. THE STATE OF CALIFORNIA, Appellee.	NOTICE OF APPEAL Cal.Supreme Court: S001958 Cal.Ct. of Appeal: B018776 Cal.Super. Ct.: A025164 (Filed Nov. 30, 1987)

NOTICE OF APPEAL TO THE SUPREME COURT
OF THE UNITED STATES

NOTICE IS HEREBY GIVEN that Eddie Gerry Story, aka Graus E. Story, the appellant above-named, hereby appeals to the Supreme Court of the United States from the final judgment of the Court of Appeals of the State of California, affirming the order of the trial court denying Appellant's motion to declare the offense of perjury to be a misdemeanor, entered herein on July 2, 1987. Such appeal is taken after Appellant's petition for review by the Supreme Court of the State of California was denied.

This appeal is taken pursuant to 28 U.S.C. Section 1257(2).

DATED: November 13, 1987

/s/ Scott Spolin
Counsel of Record for Appellant

(VERIFICATION—446 and 2015.5 C.C.P.)

STATE OF CALIFORNIA)
) ss.
COUNTY OF .....)

I, the undersigned, say: I am the ..... in the above entitled action; I have read the foregoing..... and know the contents thereof; and that the same is true of my own knowledge, except as to the matters which are therein stated upon my information or belief, and as to those matters that I believe it to be true.

.....

I certify (or declare) under penalty of perjury, that the foregoing is true and correct.

Executed on..... at ....., California
(date) (place)

.....
(Signature)

(PROOF OF SERVICE BY MAIL—
1013a, and 2015.5 C.C.P.)

STATE OF CALIFORNIA)
) ss.
COUNTY OF LOS ANGELES)

I, the undersigned, say: I am and was at all times herein employed in mentioned, a citizen of the United States and a resident of the County of Los Angeles, over the age of eighteen years

and not a party to the within action or proceeding; that residence
my business address is 433 North Camden Drive St., 900 Beverly Hills CA 90210; that on November 30, 1987, I served the within Notice of Appeal on the interested party in said action or proceeding by depositing a true copy thereof inclosed in a sealed envelope with postage thereon fully prepaid, in a mail-box, sub-post office, substation, or mail chute (or other like facility), regularly maintained by the Government of the United States at: 433 N. Camden Drive in the City of Beverly Hills, California, addressed residence
to the attorney ..... of record for said party at the office address of said attorney ....., as follows:

ATTORNEY GENERAL OF THE
STATE OF CALIFORNIA

3580 Wilshire Blvd.
Los Angeles CA 90010 (FIVE COPIES)

I certify (or declare) under penalty of perjury, that the foregoing is true and correct.

Executed on November 30 1987 at Beverly Hills, California
(date) (place)

/s/ Martin Louis Stanley
(Signature)